Selvam Holdings (Malaysia) Sdn Bhd v Grant Kenyon & Eckhardt Sdn Bhd (BSN Commercial Bank Malaysia Bhd & Ors, Intervenors)

HIGH COURT (KUALA LUMPUR) — SAMAN PEMULA NO D1-24-56 OF 1993
VINCENT NG J
13 SEPTEMBER 2002

Civil Procedure *— Bill of costs — Taxation — Appeal against decision of senior assistant registrar — Whether appellant could appeal to judge in chambers against taxation — Rules of the High Court 1980 O 59 rr 34(1), 36, (1)*

Civil Procedure *— Res judicata — Decision, finality of earlier decision — Whether Selvam Holdings (Malaysia) Sdn Bhd and Selvam Holdings (M) Sdn Bhd are the same entity*

The first and second intervenors ('the intervenors') filed a bill of costs (encl 60) against Jean Louis Jeyaraj ('JLJ') pursuant to a High Court order dated 7 November 1997 ('the 7 November 1997 order'). When the case came up for taxation of the bill of costs before the learned senior assistant registrar ('SAR'), counsel for JLJ asked for an adjournment to file an application to set aside the 7 November 1997 order. Counsel for the intervenors objected because Selvam Holdings (Malaysia) Sdn Bhd's (the plaintiff) appeal to the Court of Appeal against the 7 November 1997 order was dismissed and leave to the Federal Court was also dismissed. The SAR allowed taxed costs of RM66,344.50, inclusive of allocatur to the intervenors. JLJ ('the appellant') filed a notice of appeal to the judge in chambers (encl 61) against the SAR's decision. Counsel for the appellant raised a new issue as to whether the intervenors had locus to seek the taxation for costs pursuant to the 7 November 1997 order, when the same was not complied with and that the SAR had no jurisdiction to hear the taxation proceedings. The appellant stated that Selvam Holdings (Malaysia) Sdn Bhd was a company incorporated under the Companies Act 1965, whereas Selvam Holdings (M) Sdn Bhd was a non-existant entity and the winding up order dated 19 November 1979 to wind up Selvam Holdings (M) Sdn Bhd by Grant Kenyon & Eckhardt Sdn Bhd (the defendant) was set aside by an order of court dated 15 April 1993 and did not bind Selvam Holdings (Malaysia) Sdn Bhd. The 15 April 1993 order was subsequently set aside by the 7 November 1997 order. The appellant stated that since the 7 November 1997 order was not complied with, the 15 April 1993 order was still valid.

Held, dismissing the appeal and awarding costs to the intervenors:

(1) The appellant was trying to re-canvass the issue as to whether 'Selvam Holdings (Malaysia) Sdn Bhd' and 'Selvam Holdings

(M) Sdn Bhd' referred to one and the same entity. This issue was settled with curial finality by the Court of Appeal, wherein the said decision of 7 November 1997 was confirmed *in toto*. The intervenors must not be subjected to endless attempts by the appellant to re-open the same issues which have already been dealt with by a court of competent jurisdiction — and a fortiori by another court of higher jurisdiction. In his judgment, his Lordship Abdul Aziz J (as he then was) held that the name 'Selvam Holdings (Malaysia) Sdn Bhd' and 'Selvam Holdings (M) Sdn Bhd' referred to one and the same company and that the winding up order dated 19 November 1979 was properly made and coupled with proper appointments of receivers and managers and liquidators. Besides there being no appeal filed against this order, the Court of Appeal had also held that there was a valid winding up order against Selvam Holdings (Malaysia) Sdn Bhd (see pp 256F–H, 257B–C).

(2) The notice of appeal (encl 61) was filed in contravention of O 59 rr 34(1) and 36(1) of the Rules of the High Court 1980 ('the RHC'). There was no provision in the RHC for lodgment of appeals to the judge in chambers against the taxation per se — what was only allowed an aggrieved party was to apply for review of certain items or part of an item in the bill of costs taxed by the registrar. This view was consistent with logic as the taxation stage of any civil proceeding presupposes the legitimacy and integrity of the judgment or order pertaining to the merits of the entire case adjudicated. It was common ground that there was no application to the learned SAR under O 59 r 34(1) of the RHC for review of her decision, which was a precondition to the filing of a review of items in the taxation under O 59 r 36 before this court. The appellant's procedural approach was couched as an appeal rather than an application under O 59 r 36(1). There was no provision in the RHC for an appeal against the taxation proceedings and for the further reason that the appellant did not at all raise the issue of 'locus' before the SAR, encl 61 was in effect an application for review under r 36(1) bereft of any item or items sought for review (see p 258C–F).

[Bahasa Malaysia summary

Pencelah-pencelah pertama dan kedua ('pencelah-pencelah tersebut') telah memfailkan bil kos (kandungan 60) terhadap Jean Louis Jeyaraj ('JLJ') menurut perintah Mahkamah Tinggi bertarikh 7 November 1997 ('perintah 7 November 1997 tersebut'). Apabila kes tersebut dihadapkan untuk penetapan bil kos di hadapan penolong kanan pendaftar ('PKP'), peguam JLJ telah memohon satu penangguhan kes untuk memfailkan permohonan untuk mengenepikan perintah 7 November 1997. Peguam pencelah-pencelah membantah kerana rayuan Selvam Holdings (Malaysia) Sdn Bhd (plaintif) kepada

A Mahkamah Rayuan terhadap perintah 7 November 1997 telah ditolak dan kebenaran untuk merayu kepada Mahkamah Persekutuan tidak diberi. PKP telah membenarkan kos yang ditetapkan sebanyak RM66,344.50, termasuk alokatur kepada pencelah-pencelah. JLJ ('perayu') telah memfailkan notis rayuan kepada hakim dalam kamar (kandungan 61) terhadap keputusan PKP. Peguam perayu telah B membangkitkan isu baru, sama ada pencelah-pencelah mempunyai locus untuk menetapkan kos menurut perintah 7 November 1997, memandangkan perintah tersebut tidak dipatuhi dan PKP tidak mempunyai bidang kuasa untuk mendengar prosiding penentapan kos tersebut. Perayu menyatakan bahawa Selvam Holdings C (Malaysia) Sdn Bhd merupakan sebuah syarikat berdaftar di bawah Akta Syarikat 1965, sementara Selvam Holdings (M) Sdn Bhd merupakan sebuah entiti yang tidak wujud dan perintah penggulungan bertarikh 19 November 1979 untuk menggulungkan Selvam Holdings (M) Sdn Bhd oleh Grant Kenyon & Eckhardt Sdn Bhd (defendan) telah diketepikan oleh perintah mahkamah bertarikh D 15 April 1993 dan tidak mengikat Selvam Holdings (Malaysia) Sdn Bhd. Perintah 15 April 1993 telah diketepikan oleh perintah 7 November 1997. Perayu menyatakan bahawa memandangkan perintah 7 November 1997 tidak dipatuhi, perintah 15 April 1993 masih sah.

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Diputuskan, menolak rayuan dan memberikan kos kepada pencelah-pencelah:

(1) Perayu cuba membangkitkan semula isu sama ada 'Selvam Holdings (Malaysia) Sdn Bhd' dan 'Selvam Holdings (M) Sdn F Bhd' merujuk kepada entiti yang sama. Isu ini telah diputuskan secara muktamad oleh Mahkamah Rayuan, di mana keputusan 7 November 1997 telah ditetapkan *in toto*. Pencelah-pencelah tidak boleh tertakluk kepada pencubaan-pencubaan oleh perayu untuk membuka semula isu-isu yang sama yang telah diputuskan oleh mahkamah yang mempunyai bidang kuasa yang kompeten G — dan fortiori oleh mahkamah yang mempunyai bidang kuasa yang lebih tinggi. Di dalam penghakiman beliau, Abdul Aziz J (beliau seperti pada masa itu) telah memutuskan bahawa nama 'Selvam Holdings (Malaysia) Sdn Bhd' dan 'Selvam Holdings (M) Sdn Bhd' merujuk kepada syarikat yang sama dan perintah penggulungan bertarikh 19 November 1979 telah dibuat dengan H sah dengan perlantikan penerima-penerima dan pengurus-pengurus dan penyelesai-penyelesai yang betul. Selain daripada tiada rayuan yang telah difailkan terhadap perintah tersebut, Mahkamah Rayuan telah memutuskan bahawa terdapat satu perintah penggulungan yang sah terhadap Selvam Holdings I (Malaysia) Sdn Bhd (lihat ms 256F–H, 257B–C).

(2) Notis rayuan (kandungan 61) telah difailkan melanggar A 59 kk 34(1) dan 36(1) Kaedah-Kaedah Mahkamah Tinggi 1980

('KMT'). Tiada peruntukan di dalam KMT untuk penyerahsimpanan rayuan-rayuan kepada hakim di dalam kamar terhadap penetapan per se — pihak yang terkilan hanya dibenarkan memohon kajian semula butiran tertentu atau sebahagian daripada butiran di dalam bil kos oleh pendaftar. Pandangan ini adalah konsisten dengan logik memandangkan bahawa peringkat penetapan sebarang prosiding sivil mengandaikan kesahan dan integriti penghakiman atau perintah yang berhubung dengan merit-merit kes tersebut. Telah dipersetujui bahawa tiada permohonan kepada PKP di bawah A 59 k 34(1) KMT untuk kajian semula keputusan beliau, yang merupakan prasyarat pemfailan kajian semula butiran di dalam penetapan tersebut di bawah A 59 k 36 di hadapan mahkamah ini. Pendekatan berprosedur perayu diungkapkan sebagai suatu rayuan dan bukan permohonan di bawah A 59 k 36(1). Tiada peruntukan di dalam KMT untuk rayuan terhadap prosiding penetapan dan kerana defendan tidak membangkitkan isu 'locus' di hadapan PKP, kandungan 61 merupakan permohonan di bawah k 36(1) yang tidak mempunyai sebarang butiran atau butiran-butiran untuk dikaji semula (lihat ms 258C–F).

Notes

For cases on finality of earlier decisions, see 2 *Mallal's Digest* (4th Ed, 2001 Reissue), paras 5102–5118.

For cases on taxation, see 2 *Mallal's Digest* (4th Ed, 2001 Reissue), paras 1362–1363.

Cases referred to

Badiaddin bin Mohd Mahidin & Anor v Arab Malaysian Finance Bhd [1998] 1 MLJ 393 (refd)

Lim Soh & Ors v Allen & Gledhill [2001] 3 CLJ 233 (refd)

Selvam Holdings (M) Sdn Bhd v Grant Kenyon & Eckhardt Sdn Bhd; (BSN Commercial Bank (M) Bhd & Ors, intervenors) [2000] 3 MLJ 201 (refd)

Selvam Holdings (Malaysia) Sdn Bhd v Toby Lam & Anor [1994] MLJU 429; 4 CLJ 899 (refd)

Legislation referred to

Companies Act 1965

Rules of the High Court 1980 O 59 rr 34(1), 35(1), 36, (1), (4)

K Periasamy (*Periasamy K*) for the appellant/plaintiff.

Harjit Singh (*Gill & Tang*) for the respondents/first and second intervenors.

Vincent Ng J:

A preamble

The first and second intervenors filed a bill of costs (encl 60) against Jean Louis Jeyaraj ('JLJ') pursuant to a High Court order dated 7 November 1997 ('the 7 November 1997 order').

When the case came up for taxation of the bill of costs on 8 November 2001 before the learned senior assistant registrar ('SAR'), the counsel for JLJ asked for an adjournment on the grounds that JLJ intends to file an application to set aside the court order dated 7 November 1997. Counsel for the intervenors objected and informed the learned SAR that Selvam Holdings (Malaysia) Sdn Bhd's (plaintiff) appeal to the Court of Appeal against the 7 November 1997 order was dismissed with costs and leave to the Federal Court was also dismissed with costs.

The taxation of the bill of costs went on and the learned SAR delivered her decision on 19 November 2001 allowing taxed costs of RM66,344.50 inclusive of allocatur to the first and second intervenors ('the intervenors').

This resulted in JLJ (appellant) filing a notice of appeal to the judge in chambers (encl 61) against the decision of the learned SAR. When encl 61 came up for hearing on 12 March 2002, the counsel for the appellant raised a new issue (which was not canvassed before the SAR), namely, whether the intervenors had locus to seek the taxation for costs pursuant to the court order dated 7 November 1997 when same was not complied with — worthy of note is that the quantum of taxed costs was not in dispute.

This is how the appellant had put her case before me. Selvam Holdings (Malaysia) Sdn Bhd is a company incorporated and registered in Malaysia under the Companies Act 1965 on 17 December 1971, whereas, Selvam Holdings (M) Sdn Bhd is a non-existent entity. On 19 November 1979, a winding up order was made vide Petition No 34–1979 against Selvam Holdings (M) Sdn Bhd ('the 19 November 1979 order') on the application by Grant Kenyon & Eckhardt Sdn Bhd (defendant), but the 19 November 1979 order was set aside by an order of court dated 15 April 1993 ('the 15 April 1993 order') in the following terms:

(i) that the winding up order dated 19 November 1979 against Selvam Holdings (M) Sdn Bhd is null and void;

(ii) that the said winding up order does not bind Selvam Holdings (Malaysia) Sdn Bhd; and

(iii) hence, Selvam Holdings (Malaysia) Sdn Bhd has not been wound up.

However, it is common ground that the 15 April 1993 order was on 7 November 1997 set aside (by the 7 November 1997 order) in the following terms, that:

(a) the intervenors be allowed leave to intervene in this action and be added as defendants to the suit;

(b) cause papers be amended accordingly to reflect (a); A

(c) the order of court dated 15 April 1993 be set aside;

(d) that the costs of and incidental to the applications herein be taxed and paid forthwith by Jean Louis Jeyaraj Selvam and/or K Jaya Simbun & Associates (be it be noted that Jean Louis Jeyaraj Selvam was a director of Selvam Holdings (Malaysia) Sdn Bhd and Messrs K Jaya B Simbun & Associates were the then solicitors for JLJ.)

It has never been controverted that the 7 November 1997 order, including order (d) above, was upheld by the Court of Appeal on 10 March 2000 (see *Selvam Holdings (M) Sdn Bhd v Grant Kenyon & Eckhardt Sdn Bhd; (BSN Commercial Bank (M) Bhd & Ors, intervenors)* [2000] 3 MLJ 201). It is also C a fact that Selvam Holdings (Malaysia) Sdn Bhd's (plaintiff) application for leave to appeal to the Federal Court was dismissed with costs on 3 July 2000. The argument put forward by the appellant's (JLJ) solicitors is that the learned SAR had no jurisdiction to hear the taxation proceedings as the peremptory order of the court dated 7 November 1997 was not complied with. And that, in view of the non-compliance of the court order dated 7 D November 1997, the court order dated 15 April 1993 remains valid — the case of *Lim Soh & Ors v Allen & Gledhill* [2001] 3 CLJ 233 was cited in support. It is material here to note that this issue was also not canvassed by the appellant in the Court of Appeal.

In his written submission, learned counsel for the appellant also E ventured an opinion that the Court of Appeal in *Selvam Holdings (M) Sdn Bhd v Grant Kenyon & Eckhardt Sdn Bhd* had wrongly interpreted the factual matrix in *Badiaddin bin Mohd Mahidin & Anor v Arab Malaysian Finance Bhd* [1998] 1 MLJ 393, a Federal Court judgment. He was also of the view that the judgment of his Lordship Abdul Aziz JC (as he then was) in *Selvam Holdings (Malaysia) Sdn Bhd v Toby Lam & Anor* [1994] MLJU F 429; 4 CLJ 899 should not have been accepted and endorsed by the Court of Appeal.

After having carefully studied the written submission of counsel for the appellant, I am left with the view that the appellant is trying in an oblique fashion to, in effect, re-canvass the issue as to whether 'Selvam Holdings G (Malaysia) Sdn Bhd' and 'Selvam Holdings (M) Sdn Bhd' refer to one and the same entity. Clearly, this issue was settled with curial finality by the Court of Appeal as aforesaid, wherein the said decision of 7 November 1997 was confirmed *in toto*.

Surely, in my judgment the intervenors cannot be subjected to endless H attempts by the appellant to re-open the same issues which have already been dealt with by a court of competent jurisdiction — and a fortiori by another court of higher jurisdiction. This principle was expounded in the case of *Asia Commercial Finance (M) Bhd v Kawal Teliti Sdn Bhd* [1995] 3 MLJ 189, a Supreme Court decision, at p 197:

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> What is res judicata? It simply means a matter adjudged, and its significance lies in its effect of creating an estoppel *per rem judicatum*. When a matter between two parties has been adjudicated by a court of competent

A jurisdiction, the parties and their privies are not permitted to litigate once more the res judicata, because the judgment becomes the truth between such parties, or in other words, the parties should accept it as the truth; *res judicata pro veritate accipitur.*

It would be an abuse of the process of court for parties to be allowed to re-
B open the same issues over and over again. In his judgment delivered on 24 October 1994 in Originating Motion No D6–25–42–92, his Lordship Abdul Aziz J (as he then was) held that the name 'Selvam Holdings (Malaysia) Sdn Bhd' and 'Selvam Holdings (M) Sdn Bhd' refer to one and the same company and that the winding up order dated 19 November 1979 was properly made and coupled with proper appointments of receivers and
C managers and liquidators. Besides there being no appeal filed against this order, the Court of Appeal had also held that there is a valid winding up order against Selvam Holdings (Malaysia) Sdn Bhd. Indeed notably, in the appeal against the 7 November 1997 order, the Court of Appeal commented that 'the appellant's behaviour was highly questionable and that of their solicitors most unprofessional'. This conclusion drove the
D Court of Appeal to order costs to be borne by JLJ personally.

I am also of the view that it is highly contemptuous on the part of counsel for the appellant, Mr K Periasamy, to have thought it fit to nonchalantly let fall from his mouth the following outrageous words:

> They have no locus because Selventhiranathan J's judgment dated
E 7 November 1997 was wrong. There was an appeal against the order but the Court of Appeal wrongly interpreted the factual matrix in *Badiaddin* ... as stated by me in p 10 of Lampiran 63B of my written submission. Selvam Holdings (M) which was ordered to be wound up is a non-existent company.

F What surprised me is that such words could issue forth from his mouth when he full well knew that it was not open to the appellant to question the endorsement of the order of his Lordship Abdul Aziz J by the Court of Appeal, when the application to the Federal Court for leave was turned down — which rendered absolute finality to the entire proceedings.

My attention was also drawn by counsel for the intervenors to the fact
G that the notice of appeal to me (encl 61) was filed in contravention of O 59 rr 34(1) and 36(1) of the RHC. Rules 34(1), 35(1) and the pertaining r 36(1) and (4) provide as follows:

rule 34(1):

H (1) Any party to any taxation proceedings who is dissatisfied with the allowance or disallowance in whole or in part of any item by the Registrar, or with the amount allowed by the Registrar in respect of any item, *may apply to the Registrar to review* his decision in respect of that item.

rule 35(1):

I (1) On reviewing any decision in respect of any item, the Registrar may receive further evidence and may exercise all the powers which he might exercise on an original taxation in respect of that item, including the power to award costs of and incidental to the proceedings before him; and

any costs awarded by him to any party may be taxed by him and may be added to or deducted from any other sum payable to or by that party in respect of costs. A

rule 36(1) and (4):

(1) Any party who is dissatisfied with the decision of the Registrar to allow or to disallow any item in whole or in part on review under r 34 or 35, or with the amount allowed in respect of any item by the Registrar on any such review, *may apply to a judge for an order to review the taxation as to that item or part of an item*, if but only if, one of the parties to the proceedings before the Registrar requested the Registrar in accordance with r 35(3) to state the reasons for his decision in respect of that item or part on the review. B C

(4) Unless the judge otherwise directs, no further evidence shall be received on the hearing of an application under this rule, and no ground of objection shall be raised which was not raised on the review by the Registrar ... (Emphasis added.)

In my view, there is (for obvious and logical reasons) no provision in the RHC for lodgment of appeals to the judge in chambers against the taxation per se — what is only allowed an aggrieved party is to apply for review of certain items or part of an item in the bill of costs taxed by the registrar. This view is consistent with logic as the taxation stage of any civil proceeding presupposes the legitimacy and integrity of the judgment or order pertaining to the merits of the entire case adjudicated. It is common ground that there was no application to the learned SAR under O 59 r 34(1) of the RHC for review of her decision, which is a precondition to the filing of a review of items in the taxation under O 59 r 36 before me. I am entirely conscious of the fact that the appellant's procedural approach to me is couched as an appeal rather than an application under O 59 r 36(1). However, as, in my considered view, there is no provision in the RHC for an appeal against the taxation proceedings and for the further reason that the appellant did not at all raise the issue of 'locus' before the SAR, encl 61 is in effect an application for review under r 36(1) bereft of any item or items sought for review — clearly, an attempt by the back door (I may say) to 'knock off', not one, but all the items taxed bill by nullifying the whole process of taxation. D E F G

In the event, I dismissed the appeal in encl 61 and awarded costs to the intervenors.

In postlude H

As soon as the appeal was dismissed, counsel for the intervenors requested that this court order that costs on encl 61 be borne by Mr K Periasamy personally, due to his contumacious and culpable conduct, as he was at all times aware of the earlier decisions and yet took it upon himself to represent JLJ who paid scant regard to or was contemptuous of the earlier court orders from various levels. In response, I suggested that should the appellant take this matter further, counsel for the intevenors could then quite justifiably pray for costs here and in the court above to be personally borne by the I

A solicitors. As it promptly turned out, an appeal to the Court of Appeal against my decision here was indeed filed by Messrs Periasamy K.

Appeal dismissed and costs awarded to the intervenors.

Reported by Chew Phye Ken

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